CIMB Islamic Bank Bhd v LCL Corp Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D4–22A-457 OF 2010
MOHD ZAWAWI J
9 JUNE 2011

Banking — Banks and banking business — Islamic banking — Islamic banking concept of bai bithman ajil ('BBA facility') — Defendants defaulted in repayments to plaintiff — Whether BBA facility was null and void — Whether court should uphold transactions as contracts entered by both parties

Civil Procedure — Summary judgment — Application for — Whether proper case to grant summary judgment — Whether defendants raised triable issues — Whether BBA facility was null and void — Whether amount claimed was inaccurate — Whether certificate of indebtedness conclusive — Whether plaintiff's calculation of ta'widh was wrong — Whether plaintiff had right to claim against second defendant

The plaintiff, an Islamic bank, had to carry Islamic banking business and operations in a manner that did not involve any element disapproved by Islam. Thus, when the first defendant, a customer of the plaintiff bank, applied for a term-financing facility, the plaintiff granted him the loan amount of RM48,450,000 under the concept of *bai bithman ajil* ('the BBA facility'), a sale and purchase transaction for the financing of an asset on a deferred and installment basis with a pre-agreed payment period. In the present BBA facility, the first defendant agreed to sell to the plaintiff bank 16,000,000 units of the second defendant's shares in the first defendant's company ('the asset'). However, the first defendant was not the owner of the asset. The second defendant, director of the first defendant company was the owner of the asset. Thus, by way of a unilateral benevolent contract ('the letter of hibah') the second defendant voluntarily gave the asset to the first defendant, who in turn executed the asset purchase agreement to sell the asset to the plaintiff at RM12,125,000 ('the purchase price'). Thereafter the plaintiff entered into an asset sale agreement to sell the asset back to the first defendant at RM16,087,500 ('the sale price'), with the payment of the sale price deferred to the date stipulated in the asset sale agreement. Finally, by way of another letter of hibah the first defendant had gifted the asset back to the second defendant. The parties agreed to enter into four sets of these agreements with the intention of providing the first defendant with the liquidity to refinance its existing BBA facility ('the first BBA facility'). When the first defendant defaulted in his repayments to the plaintiff bank despite notices of demand issued to it, the

plaintiff commenced an action against the defendants. This was the plaintiff's application for summary judgment to recover the outstanding sums of money, *ta'widh* or compensation and costs from the defendants. In response the defendants argued that this was not a proper case for summary judgment, namely because, the BBA facility was null and void; the amount claimed was inaccurate; the plaintiff's calculation of *ta'widh* was wrong; and the plaintiff had no claim against the second defendant.

Held, allowing the plaintiff's application with costs:

(1) The first defendant's argument that the transaction between the parties was not a bona fide sale under the BBA concept but rather a rescheduling of the repayments of the first BBA facility had to fail. This court found that there was nothing in the legal documentation that indicated that the present BBA facility was for rescheduling the repayment under the first BBA facility. Based on the facts and the documents, the BBA facility before this court was not for rescheduling but for refinancing the first BBA facility. The parties had agreed to be bound to give effect to the ultimate intention of refinancing the first BBA facility. In this present case, the nature of transaction embarked into by the parties was called *al-inah* or *bai-al-inah*, which the Shariah Advisory Council of Bank Negara Malaysia had officially endorsed in their legal rulings and resolutions. As such, and in the absence of any legal factor that could vitiate a contract, this court had no reason but to uphold the transactions as contracts entered by both parties (see paras 9–14, 22–25 & 57).

(2) The defendants' submission that the amount claimed was inaccurate had no merit. On the contrary, the plaintiff had specified the precise amount owing. In fact, the second plaintiff had duly requested the first defendant to disregard the first notice of demand. In any case, if there was confusion as to the exact sum due and owing, the defendants could have clarified this with the plaintiff bank at an earlier date. The plaintiff had furnished two documentary proofs, ie the statement of account and the certificate of indebtedness to substantiate its claim. It is settled law that this court had to give effect to such documents in the absence of any evidence to the contrary (see paras 30–34).

(3) In the present case, the relationship between the plaintiff and the first defendant was regulated by the terms and conditions they had agreed upon in their letter of offer and the assets purchase and asset sale agreements. On the plain reading of the letter of offer, the first defendant would be granted *ibra'*, or a rebate upon an early settlement of the BBA facility. Unfortunately, the defendants had made no effort to make any settlement of the sum outstanding under the BBA facility and the termination of the BBA facility before the expiry of its tenure was not

considered early settlement. As such, the plaintiff was under no obligation to grant an *ibra'* to the defendants (see paras 39–44).

(4) In the circumstances of this case, it was undisputed that the plaintiff had the right to impose compensation (*ta'widh*) on overdue installments and payments of the selling price as agreed (see paras 47–52).

(5) By virtue of cl 6 of the memorandum of deposit of securities executed by the second defendant with the plaintiff bank, it was clear that the plaintiff had the right to claim the outstanding amount from the second defendant as the chargor (see para 55–56).

(6) In the instant case, the court was satisfied that there was no real prospect for the defendants successfully defending the claim by the plaintiff and thereby allowed the plaintiff's application (see para 60).

[Bahasa Malaysia summary

Plaintif, sebuah bank Islam, telah menjalankan perniagaan perbankan dan operasi berlandaskan Islam yang tidak melibatkan apa-apa elemen yang bercanggah agama Islam. Oleh itu, apabila defendan pertama, pelanggan plaintif bank, memohon untuk kemudahan kewangan bertempoh, plaintif telah memberikannya pinjaman berjumlah RM48,450,000 di bawah konsep *bai bithman ajil* ('kemudahan BBA'), suatu transaksi jual beli untuk membiayai aset yang bertangguh dan berasaskan ansuran untuk tempoh bayaran yang terdahulu dipersetujui. Untuk kemudahan BBA ini, defendan pertama bersetuju untuk menjual kepada plaintif bank 16,000,000 unit saham defendan kedua dalam syarikat defendan pertama ('aset'). Walau bagaimanapun, defendan pertama bukan pemilik aset tersebut. Defendan kedua, pengarah kepada syarikat defendan pertama adalah pemilik aset tersebut. Oleh itu, melalui kontrak ihsan unilateral ('surat hibah') defendan kedua secara sukarela telah memberikan aset tersebut kepada defendan pertama, yang kemudian telah menyempurnakan perjanjian belian aset tersebut untuk menjual aset tersebut kepada plaintif pada harga RM12,125,000 ('harga belian'). Berikutan itu, plaintif telah memasuki perjanjian jualan aset untuk menjual balik aset tersebut kepada defendan pertama pada harga RM16,087,500 ('harga jualan'), dengan bayaran harga jualan ditunda ke tarikh yang ditetapkan dalam perjanjian jualan aset. Akhirnya, melalui satu lagi surat hibah defendan pertama telah memberi balik sebagai hadiah aset tersebut kepada defendan kedua. Pihak-pihak bersetuju untuk memasuki empat lagi perjanjian tersebut dengan niat memberikan defendan pertama kecairan pembiayaan semula kemudahan BBA yang sedia adanya ('kemudahan BBA pertama'). Apabila defendan pertama gagal dalam bayaran baliknya kepada plaintif bank meskipun notis tuntutan telah dikeluarkan kepadanya, plaintif telah memulakan tindakan terhadap defendan-defendan. Ini adalah permohonan plaintif untuk penghakiman terus untuk mendapat balik jumlah baki wang tersebut, *ta'widh* atau pampasan dan

kos daripada defendan-defendan. Sebagai jawapan, defendan-defendan berhujah bahawa ini bukan kes sesuai untuk penghakiman terus, terutamanya kerana, kemudahan BBA adalah terbatal dan tidak sah; jumlah yang dituntut tidak tepat; pengiraan *ta'widh* plaintif adalah salah; dan plaintif tiada tuntutan terhadap defendan kedua.

Diputuskan, membenarkan permohonan plaintif dengan kos:

(1) Hujah defendan pertama bahawa transaksi antara pihak-pihak bukan jualan dengan niat baik di bawah konsep BBA tetapi lebih kepada penjadualan semula bayaran balik kemudahan BBA yang pasti gagal. Mahkamah ini mendapati bahawa tiada apa-apa dalam dokumentasi undang-undang yang menunjukkan bahawa kemudahan BBA ini adalah untuk penjadualan semula bayaran semula di bawah kemudahan BBA pertama tersebut. Berdasarkan fakta dan dokumen tersebut, kemudahan BBA di hadapan mahkamah ini bukan untuk penjadualan semula bayaran balik kemudahan BBA pertama tersebut. Pihak-pihak telah bersetuju untuk terikat bagi melaksanakan niat pembiayaan semula kemudahan BBA pertama tersebut. Dalam kes ini, sifat transaksi yang dimasuki oleh pihak-pihak dikenali sebagai *al-inah* atau *bai-al-inah*, yang mana Jawatankuasa Penasihat Syariah Bank Negara Malaysia telah diindorskan dalam peraturan dan resolusinya. Oleh itu, dan tanpa kewujudan apa-apa faktor perundangan yang boleh menjadikan kontrak itu tidak sah, mahkamah ini tiada sebab tetapi untuk memutuskan transaksi-transaksi tersebut sebagai kontrak-kontrak yang telah dimasuki oleh kedua-dua pihak (lihat perenggan 9–14, 22–25 & 57).

(2) Hujah defendan bahawa jumlah yang dituntut tidak tepat adalah tanpa merit. Sebaliknya, plaintif telah menyatakan secara spesifik jumlah sebenar yang perlu dibayar. Bahkan, plaintif kedua telah pun meminta defendan pertama untuk tidak menghiraukan notis tuntutan pertama. Dalam apa jua keadaan, jika terdapat kekeliruan berhubung jumlah sebenar yang terhutang dan perlu dibayar, defendan-defendan sepatutnya boleh menjelaskan ini dengan plaintif bank terlebih dahulu. Plaintif telah mengemukakan dua bukti dokumentar, iaitu penyata akuan dan sijil keberhutangan untuk menyokong tuntutannya. Adalah undang-undang tetap bahawa mahkamah ini perlu menguatkuasakan dokumen-dokumen tersebut tanpa kewujudan apa-apa bukti bertentangan (lihat perenggan 30–34).

(3) Dalam kes ini, hubungan antara plaintif dan defendan pertama adalah berasaskan terma dan syarat yang telah dipersetujui oleh mereka dalam surat tawaran mereka dan perjanjian-perjanjian aset belian dan jualan mereka. Jika dibaca secara harfiah surat tawaran itu, defendan pertama akan diberikan *ibra'*, atau rebat jika membuat penyelesaian awal untuk kemudahan BBA itu. Namun begitu, defendan-defendan tidak berusaha

membuat apa-apa penyelesaian untuk jumlah baki kemudahan BBA dan penamatan kemudahan BBA sebelum tarikh luputnya tidak diambil kira sebagai penyelesaian awal. Oleh itu, plaintif tidak mempunyai tanggungjawab untuk memberikan *ibra'* kepada defendan-defendan (lihat perenggan 39–44).

(4) Dalam keadaan kes ini, adalah tidak dipertikaikan bahawa plaintif mempunyai hak untuk mengenakan pampasan (*ta'widh*) ke atas bayaran ansuran dan bayaran-bayaran dengan harga jualan seperti yang dipersetujui (lihat perenggan 47–52).

(5) Menurut fasal 6 kepada memorandum sekuriti deposit yang dimasuki oleh defendan kedua dengan plaintif bank, adalah jelas bahawa plaintif mempunyai hak untuk menuntut jumlah baki yang perlu dibayar daripada defendan kedua sebagai deposit of sekuriti oleh defendan kedua dengan plaintif bank, adalah jelas bahawa plaintif mempunyai hak untuk menuntut baki jumlah daripadanya daripada defendan kedua sebagai penggadai (lihat perenggan 55–56).

(6) Dalam kes ini, mahkamah berpuas hati bahawa tiada prospek sebenar untuk defendan-defendan berjaya mempertahankan tuntutan oleh plaintif dan dengan itu membenarkan permohonan plaintif (lihat perenggan 60).]

Notes

For cases on application for summary judgment, see 2(3) *Mallal's Digest* (4th Ed 2010 Reissue) paras 7895–7945.

For cases on Islamic banking, see 1(2) *Mallal's Digest* (4th Ed 2010 Reissue) paras 2273–2290.

Cases referred to

Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor And other appeals [2009] 6 MLJ 839; [2009] 6 CLJ 22, CA (folld)

Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corp Sdn Bhd [2003] 2 MLJ 408; [2003] 1 CLJ 625, CA (refd)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400; [1992] 1 CLJ 14 (Rep); [1992] 1 CLJ 627, SC (refd)

Cempaka Finance Bhd v Ho Lai Yin (trading as KH Trading) [2006] 2 MLJ 686; [2006] 3 CLJ 544, FC (refd)

John Wallingford v The Directors & C of The Mutual Society [1880] 5 AC 685, HL (refd)

Majlis Amanah Rakyat v Bass bin Lai [2009] 2 CLJ 433, HC (refd)

Nik Che Kok @ Nik Soo Kok v Public Bank Bhd [2001] 2 MLJ 328; [2001] 2 CLJ 157, CA (refd)

Polygram Records Sdn Bhd v The Search [1994] 3 MLJ 127; [1994] 1 LNS 205, HC (folld)

Legislation referred to

Islamic Banking Act 1983 s 2
Rules of the High Court 1980 O 14

HL Chan (Azim Tunku Farik & Wong) for the plaintiff.
BE Teh (Teh & Associates) for the defendants.

Mohd Zawawi J:

INTRODUCTION

[1] This judgment is in respect of the plaintiff's application for summary judgment against the defendants pursuant to O 14 of the Rules of the High Court 1980 ('encl 14').

[2] The application is for recovery of the sum due under the RM48,500,000 term financing-i facility under the concept of *bai bithaman ajil* ('BBA facility), granted to the first defendant which, as at 18 May 2010, amounting to RM54,442,744.08. Apart from the said claim, the plaintiff also sought for *ta'widh* and costs.

[3] In deciding whether to grant summary judgment, this court has to consider whether there is any triable issue in this case which warrants a full blown trial. For that purpose, I am mindful of the Supreme Court's judgment in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 14 (Rep); [1992] 1 CLJ 627 which emphasises that in an application under O 14, this court has to be satisfied that the defence has not only raised an issue, but also that the said issue is triable. Where the assertion, denial or dispute made by parties is equivocal or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, this court has to reject such assertion or denial by rendering the issues raised not triable. Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, this court should exercise its duty under O 14 even the said question is at first blush of some complexity and therefore takes a little longer to understand.

FACTUAL BACKGROUND

[4] The plaintiff is an Islamic bank licensed under the Islamic Banking Act 1983 ('IBA 1983'). The first defendant is the customer of the plaintiff by virtue of the BBA facility granted to them and the second defendant is the securities provider by reason of the memorandum of deposit of securities (third party) dated 24 April 2009 ('MOD').

[5] The dispute arises out of the disinclination on the part of the defendants to pay the amount outstanding under the BBA facility despite of notices of demand dated 20 May 2010 issued to them. This outstanding is the shortfall after the plaintiff have exercised their rights under the MOD by selling the shares belong to the second defendant on 11 December 2009 at RM3,666,822.80.

ARGUMENTS BY LEARNED COUNSEL FOR THE PLAINTIFF AND THE DEFENDANTS

[6] In response to the instant application, learned counsel for the defendants argued on five main issues: (a) that the BBA facility is null and void; (b) that the amount claimed is wrong and inaccurate; (c) that the defendants are entitled for *ibra*'; (d) that the calculation on *ta'widh* is wrong, and (e) that the plaintiff has no right to claim against the second defendant. That being the case, it was submitted that this is not a proper case for summary application.

[7] In countering the arguments, learned counsel for the plaintiff denied the allegations put forth by the defendants and submitted that they are bound by the agreements that have been duly perfected. In the absence of any manifest error on the statement of account, this court is obliged to hold that the said statement is the final and conclusive proof of indebtedness of the defendants to the plaintiff.

[8] I shall now proceed to examine and consider each issue relied by the defendants in resisting this application in turn.

FINDING OF THE COURT

The validity of the BBA facility

[9] In the instant case, the defendants wish this court to believe that the transaction between the plaintiff and the first defendant is not a bona fide sale under the BBA concept but it is rather a rescheduling of the repayments under the *bai bithaman ajil* facility granted in the year 2008 ('first BBA facility'). Hence, the imposition of a higher sale price by the plaintiff in the BBA facility was in contravention of the resolution No 96 passed by the Shariah Advisory Council of Bank Negara Malaysia ('SAC'). For this assertion, reliance was placed on the antecedents of the BBA facility sued upon, the allegation that no monies were ever disbursed under the BBA facility, the fact that there is no termination in respect of the first BBA facility and the utilisation of the same asset in the BBA transaction.

[10] The stand taken on behalf of the plaintiff is simple. The first BBA transaction and the one before this court are two different transactions. Placing reliance on the celebrated Court of Appeal's decision in *Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor And other appeals* [2009] 6 MLJ 839; [2009] 6 CLJ 22, learned counsel for the plaintiff concluded by saying that as the defendants had voluntarily agreed to be bound by the terms of the agreements and letters of *hibah* collectively for the BBA facility and had received the benefits there under, the issue raised is not genuine for a full trial.

[11] The court finds considerable force in the submission of learned counsel for the plaintiff.

[12] Concededly, the relationship between the plaintiff and the defendants started when the first defendant was granted with the first BBA facility in 2007 to refinance the short term advance facility of RM50,000,000 from CIMB Bank Bhd. Then, upon application by the first defendant, the plaintiff has granted the BBA facility the purpose of which to refinance the existing facility of RM48,500,000 (Account No 1404–0000207–40–7). This court notes that there is nothing in the BBA facility legal documentations indicates that the said facility is for rescheduling the repayment under the first BBA facility. On this basis alone, the contention by the defendant that the BBA Facility is in fact for rescheduling purposes must fail.

[13] In order to facilitate the aforesaid objective, parties have voluntarily agreed to embark into sale transactions based on *bai bithaman ajil* principle (BBA) which involve 16,000,000 units of the second defendant's shares in the first defendant's company ('the asset').

[14] BBA is a sale contract in which the payment of the price is deferred and payable at a certain particular time in the future. In fact, it can be implicated in any sale contract which includes *bai' al-inah* except for *salam* contract, as the payment of *salam* must be settled in full at the outset of the contract. From this, it is obvious that BBA is not a kind of sale; rather it refers to the manner of payment via a deferred payment basis, be it a lump sum payment or installments. However, modern practices in banking and finance have somewhat modified this situation. BBA has been referred to as the sale and purchase transaction for the financing of an asset on a deferred and installment basis with a pre agreed payment period (see *INCEIF CIFP Module on Applied Shariah In Financial Transactions*, at p 69).

[15] Concerning a contract on BBA, Raus Sharif JCA (as he then was) in *Bank Islam Malaysia Bhd v Lim Kok Hoe* had this to say:

A BBA contract is a financial instrument in Islamic banking. It is the most common form of transaction being used in Islamic banking in this country. Basically, a BBA contract is a deferred payment sale contract. It is used to finance bank's customers to purchase and own properties or assets. It involves two distinct contracts, one a property purchase agreement and also a property sale agreement.

In a typical BBA contract, the customer will first sell the property or asset to the bank under the property purchase agreement. The bank's purchase price would be the amount required by the customer. That sum is called the facility amount or the financing amount. It is also described as the bank's purchase price.

[16] In BBA or general sale contract, it is trite that what is not owned by the seller cannot be sold. Thus, for a valid sale contract the subject of the sale must be in the ownership of the seller at the time of sale (see Muhammad Ayub, *Understanding Islamic Finance*, John Wiley & Sons, Ltd, at p 135 and Mufti Muhammad Taqi Usmani, *An Introduction to Islamic Finance*, Kluwer Law International Hague, 2002, at p 67).

[17] According to Wahbah al-Zuhayli, ownership is 'a specified right on something that prevents other people from interfering with due to the fact that its owner has absolute right to utilise it provided that there is no shariah restriction'. Another Muslim scholar, Al-Sayuti defined ownership as 'a legal interest vested in a thing itself or in its usufruct, giving its beneficiary the right to profit from it or receive compensation according to the attribution which he possesses' (see Dr Wahbah Al-Zuhayli, *al-Fiqh al-'Islami wa 'Adillatuh*, Vol 2, 2002, Dar ad-Fikr, Damascus, at p 147).

[18] Being an Islamic bank, the plaintiff must carry Islamic banking business and operations which do not involve any element disapproved by the religion of Islam (see s 2 of the IBA 1983). Being that so, in the light of the said principle, letter of *hibah* (or letter of gift) was used to fulfill the said condition to enable the first defendant to be the owner of the asset.

[19] *Hibah* means giving away the ownership of an asset with immediate effect without any return. It is a *unilateral benevolent contract* in which a party transfers the ownership of an asset to a person without any consideration during the lifetime of the giver (see *Wizarah al-Awqaf wa al-Syu'un al-Islamiah, Al-Mausu'ah Al-Fiqhiyyah,* 1993, Vol 42, at p 120 and *Shariah Resolutions in Islamic Finance, Bank Negara Malaysia,* 2007, at p 71).

[20] In this case, the parties agreed to enter into the following four sets of agreements with the plaintiff *one after another*, on the same date and in respect of the same above mentioned asset:

(a) the letter of *hibah* dated 24 April 2009 from the second defendant who

voluntarily gave the asset to the first defendant, the asset purchase agreement dated 24 April 2009 ('asset purchase agreement (1)') where the first defendant sold to the plaintiff the asset at RM12,125,000 ('purchase price'). The plaintiff then sold back the same asset to the first defendant at RM16,087,500 ('sale price') the payment of which on deferred term as enunciated in the asset sale agreement dated 24 April 2009 ('asset sale agreement (1)'). Afterward, by another letter of *hibah* dated 24 April 2009, the first defendant conveyed, by way of gift to the second defendant, the same asset. All the aforesaid documents are exhibited and marked as CIMB-2A in encl 15. Enclosure 15 is an affidavit affirmed by Eddy Chong Hock Chuan on 18 August 2010;

(b) the letter of *hibah* dated 24 April 2009 from the second defendant who voluntarily gave the asset to the first defendant, the asset purchase agreement dated 24 April 2009 ('asset purchase agreement (2)') where the first defendant sold to the plaintiff the asset at RM12,125,000 ('purchase price'). The plaintiff then sold back the same asset to the first defendant at RM16,087,500 ('sale price') the payment of which on deferred term as enunciated in the asset sale agreement dated 24 April 2009 ('asset sale agreements)'). Afterward, by another letter of *hibah* dated 24 April 2009, the first defendant conveyed, by way of gift to the second defendant, the same asset. All the aforesaid documents are exhibited and marked as CIMB-2B in encl 15;

(c) the letter of *hibah* dated 24 April 2009 from the second defendant who voluntarily gave the asset to the first defendant, the asset purchase agreement dated 24 April 2009 ('asset purchase agreement (3)') where the first defendant sold to the plaintiff the asset at RM12,125,000 ('purchase price'). The plaintiff then sold back the same asset to the first defendant at RM16,087,500 ('sale price') the payment of which on deferred term as enunciated in the asset sale agreement dated 24 April 2009 ('asset sale agreement (3)'). Afterward, by another letter of *hibah* dated 24 April 2009, the first defendant conveyed, by way of gift to the second defendant, the same asset. All the aforesaid documents are exhibited and marked as CIMB-2C in encl 15; and

(d) the letter of *hibah* dated 24 April 2009 from the second defendant who voluntarily gave the asset to the first defendant, the asset purchase agreement dated 24 April 2009 ('asset purchase agreement (4)') where the first defendant sold to the plaintiff the asset at RM12,125,000 ('purchase price'). The plaintiff then sold back the same asset to the first defendant at RM16,087,500 ('sale price') the payment of which on deferred term as enunciated in the asset sale agreement dated 24 April 2009 ('Asset sale agreement (4)'). Afterward, by another letter of *hibah* dated 24 April

2009, the first defendant conveyed, by way of gift to the second defendant, the same asset. All the aforesaid documents are exhibited and marked as CIMB-2D in encl 15.

[21] What is obvious in the above said arrangements is that it is not the intention of the parties to own the asset but to have liquidity available for the purpose of refinancing the first BBA facility. It looks like a *hiyal* or legal stratagems to circumvent the prohibition of *riba* by way of sale. Hence, one might say that the sale is fictitious.

[22] This court has emphasised in the previous paragraphs that BBA is a sale contract in which the payment of the price is deferred. It can be implicated in any type of sale except salam contract. In this present case, the nature of transaction embarked into by the parties is called *al-Inah* or *bai al-inah*.

[23] *Al-'Inah* or *Bai' Inah* conceptually refers to a sale of an asset, which is later repurchased at a different price, whereby the deferred price is higher than the cash price. It aims to obtain liquidity or cash money. The theory and application of this concept are still regarded as a matter of juristic disagreement amongst the Shariah scholars because it resembles a *hilah*. However, if *hilah* is regarded as a mode to solve problems (*makhraj*) that is much needed by the people, the transaction is acceptable (see *Shariah Resolutions in Islamic Finance, Bank Negara Malaysia*, 2007, at pp 66–70).

[24] Following the Shafi'i school of Islamic law who legalised and validated *'Inah* transactions, the Shariah Advisory Council of Bank Negara Malaysia ('SAC') had officially endorsed *bai' al 'inah* transaction in their legal rulings and resolutions. One of the arguments raised to support their adoption of the Shafi'is view is public interest consideration (*maslahah*) ie to overcome the problem of liquidity shortage in the country without having to resort to conventional *riba*-based borrowing. The legalisation of *bai' inah* may also be said to be in line with the legal maxim on the lesser of two evils (*akhaf al dararain*) (see Associate Professor, Dr Engku Rabiah in her article *Bay Al-Inah and Tawarruq* (see Essential Reading in Islamic Finance, (2008), CERT Publication at p 136 and *Majlis Amanah Rakyat v Bass bin Lai* [2009] 2 CLJ 433).

[25] In the light of the above and in the absence of any legal factor that could vitiate a contract, this court has no reason but to uphold the transactions and contracts entered by both parties and the allegation by the defendants that the plaintiff failed to disburse the monies under the BBA facility is without merit.

[26] It is wrong for learned counsel for the defendants to employ the word 'loan' when referring to the transactions between the parties throughout his

submissions. This is because, in Islamic finance, the only loan recognised is qardh or qardh hasan. *Qardh* means loan contract between two parties in which repayment of the loaned amount must be of the same value without additional return (see *Shariah Resolutions in Islamic Finance, Bank Negara Malaysia*, 2007, at p 34). It does not involve any underlying subject matter to be exchanged between the parties. On contrary, in this case, it is a sale based transaction where there is underlying subject matter.

[27] The so called resolution No 96 relied by learned counsel for the defendants is entirely misconceived in respect of its use. The statement quoted by the counsel is actually part of the resolution made by the SAC in its 32nd meeting on 27 February 2003/25 Zulhijjah 1423. Therefore, it could not be identified as resolution No 96. The resolution has been passed to permit *ibra'* in a variable rate BBA product which has no relevancy to our present case as the rate involves is a fixed rate. Furthermore, the BBA facility before this court is not for rescheduling but for refinancing the first BBA facility. For ease reference, the said resolution is reproduced herein:

Resolution

95. The Council in its 32nd meeting on 27th February 2003/25th Zulhijjah 1423 resolved that granting of *ibra'* in a variable rate *bai' bithaman ajil* product is permissible. In this context, the bank is the party who offered the *ibra'* (unilaterally promise to give *ibra*') to the customers and the bank may decide to give *ibra'* in any manner it feels appropriate. If the bank has promised (binding promise) to give ibra' to its customers, the bank bound to fulfill its promise.

96. Based on the mutual agreement in the contract, the financing period for the customer can be extended without the need to execute fresh contract provided that both parties fulfill all conditions in the agreement and the final price charged on the customers shall not exceed the original selling price (based on the ceiling profit rate) contracted earlier.

[28] Apart from the above said arguments, learned counsel for the defendants also claimed that there was uncertainty in respect of the terms and conditions under the first BBA facility because the relevant asset purchase and asset sale agreements were never perfected by both parties.

[29] With respect, it is my considered view that the issue has no relevancy and it carries no weight. My reasons are as follows:

(a) the transactions taken place between the parties are sale based transactions, be it under the first BBA facility or the one under the present claim. There are two separate and different agreements involved;

(b) the claim brought by the plaintiff against the defendants does not arise from the first BBA facility but from the subsequent BBA facility granted to them;

(c) furthermore, the fact that the facility amount of RM50,000,000 under the first BBA facility was duly disbursed by the plaintiff as evidenced in letter of disbursement dated 28 August 2008 exhibited and marked as 'CIMB-7A' in encl 25 was never disputed by the defendants; and

(d) there is no proof furnished by the defendants that could lead to the existence of *al bai' 'ala albai'* which is a sale over the sale of another person. In this type of transaction, there must be a third party attempts to sell his product while the sale deal is in the process of being concluded between two persons. The intention of the third person is to upset the bargain.

THE CORRECTNESS OF THE AMOUNT CLAIMED

[30] I shall now deal with the next issue which concerns the correctness of the amount claimed. According to the defendants, the plaintiff's solicitors by a letter dated 12 April 2010 ('first NOD') demanded of the first defendant the sum of RM43,773,586.92 as at 9 April 2010. Subsequently, in another letter dated 20 May 2010 ('second NOD'), the same firm made a demand for RM54,442,744.08 as at 18 May 2010. This, according to learned counsel for the defendants tantamount to gharar or uncertainty.

[31] This court is unable to agree with the above said arguments even if indeed there had been the gharar as alleged. In *Nik Che Kok @ Nik Soo Kok v Public Bank Bhd* [2001] 2 MLJ 328; [2001] 2 CLJ 157, Shaik Daud Ismail JCA (as he then was) had this to say:

> For all intents and purposes it is a notice of demand failing which the respondent could have legally filed a suit against the principal debtor as well as against the guarantors. Conceded that the first notice of demand did not specify the precise amount owing but there is no general rule that such a notice must specifically mention the precise amount owing. We are of the view that a demand is for the purpose of bringing home the debtor that the creditor is demanding its money.

[32] It is settled that the law applicable in the BBA contract is no different from the law that is applicable in a conventional loan agreement (see *Bank Kerjasama Rakyat Malaysia Bhd v Emcee Corp Sdn Bhd* [2003] 2 MLJ 408; [2003] 1 CLJ 625 and *Bank Islam Malaysia Bhd v Lim Kok Hoe*).

[33] On contrary, in this case, the plaintiff did specify the precise amount owing. Although there was the first NOD issued before hand, it was clear from

the second NOD that the plaintiff had duly requested the defendants to disregard the first one in order to avoid misunderstanding or confusion. Therefore, I could not see how this situation could be prejudicial to the defendants. Even if there had still have confusion and uncertainty, the defendants, who wish to know the exact and precise amount, could have asked the plaintiff what sum they are expecting to be paid and not be waiting until this case came up before this court where the same could be raised at the first available opportunity.

[34] The amount claimed in this application is RM54,442,744.08 as at 18 May 2010. The plaintiff has furnished two documentary proofs ie the statement of account and the certificate of indebtedness to substantiate the said claim. It is a settled law that this court should give effect to such documents which have been agreed by the parties to be conclusive evidence on the defendants' indebtedness under the second BBA facility. Since there was no evidence to the contrary before this court to cast doubt on the accuracy of the certificate, this c ourt ruled that the issue raised is with no merit. The legal position of the certificate of indebtedness is well settled in *Cempaka Finance Bhd v Ho Lai Yin (trading as KH Trading)* [2006] 2 MLJ 686; [2006] 3 CLJ 544.

IBRA'

[35] The next issue put forth by the defendants is on their entitlement to *ibra'*. On this issue, learned counsel for the defendants argued that they are entitled to *ibra'* because the BBA facility was terminated by the plaintiff before the expiry of its tenure and this was considered as an early settlement.

[36] There are many definitions of *ibra'*. Among the literal meanings of *al-ibra'* are elimination, release, acquittal and removal of something. According to Ibn al-'Arabi, *bari'* means to release, eliminate or purify and to remove or inter distance (see Dr Abd al-Rahman Salih al-Atram, *Ibra' In Islamic Finance: Adaptation And Application*, Contemporary Issues in Islamic Finance: Deliberation at the International Shariah Scholars Dialogue 2006, Central Bank of Malaysia, at p 294). In technical term, it means surrendering one's right of claim over debt either partially or in full (see *Shariah Resolutions in Islamic Finance*, Bank Negara Malaysia, 2007, at p 40 and *Resolusi Syariah Dalam Kewangan Islam*, 2010, at p 123).

[37] The SAC in its 95th meeting held on 28 January 2010 had decided that in line with the need to safeguard *maslahah* (public interest) and to ensure justice to the financiers and customers, Islamic banking institutions are obliged to grant *ibra'* to customers for *early settlement* of financing based on buy and sell contracts (such as *bai' bithaman ajil* or *murabahah*). In order to eliminate

uncertainties pertaining to customers' rights in receiving *ibra'* from Islamic banking institutions, the granting of *ibra'* must be included as a clause in the legal documentation of the financing. The determination of *ibra'* formula will be standardised by Bank Negara Malaysia (see Resolutions of Shariah Advisory Council of Bank Negara Malaysia on *Ta'widh*, *Ibra* and *Late Payment Charge, Islamic Banking and Takaful Department*, BNM/RH/NT 008-8, at p 2). The effective date of this resolution is 7 June 2010.

[38] This resolution was made pursuant to the several issues on *ibra'* rose at the court of law particularly at Kuala Lumpur High Court and the inconsistency of practices amongst the Islamic banks in imposing *ibra'* amount (see Prof Madya Dr Asyraf Wajdi Dusuki & 2 ors, *Implimentasi Ibra' dalam Produk Berasaskan Harga Tangguh dalam Sistem Perbankan Islam: Analisis dan Perspektif Operasi Perbankan dan Maqasid Syariah*, ISRA Research Paper (No 16/2010), at pp 1-3).

[39] Before this, in its 24th meeting held on 24 April 2002, SAC resolved that Islamic banking institutions may incorporate the clause on undertaking to provide *ibra'* to customers who make early settlement in the Islamic financing agreement and with the inclusion of *ibra'* clause, the bank is bound to honour that promise. This resolution is made pursuant to the practice of the bank giving rebate solely on their discretion which caused confusion amongst the customer whether they are eligible to receive *ibra'* when they make early settlement (see *Shariah Resolutions in Islamic Finance*, Bank Negara Malaysia, 2007, at p 41).

[40] The crucial word here is 'an early settlement'. Do these words include the early termination by the plaintiff upon default on the part of the defendants?

[41] In this case, the relationship between the plaintiff and the first defendant is regulated by the terms and conditions they agreed upon as become apparent in the letter of offer dated 17 April 2009 and the asset purchase and asset sale agreements mentioned in para 19.

[42] On that basis, this court finds that in paras 21 and 22 of the letter of offer, it was agreed that the first defendant shall be given the right to make early settlement on the BBA facility and the plaintiff shall be entitled to grant *ibra'* and the plaintiff's calculation of *ibra'* shall be final and binding. It was further agreed that for entitlement of *ibra'* on early settlement basis of the selling price, the first defendant is required to give thre days advance notice to the plaintiff, which early settlement must be made on a profit payment date. However, should the notice is less than three days, the plaintiff shall be entitled to grant a lower *ibra'*.

[43] On the plain reading of the said letter, the early settlement only refers to a situation when the first defendant makes early payment of the BBA facility before the end of the tenure without compulsion. Unfortunately, it was not the defendants' case as until to date, there is still no effort to settle the outstanding.

[44] For the foregoing reasons, the defendants' contention must fail. The plaintiff is under no obligation neither duty to grant an *ibra'* to the defendants.

TA'WIDH

[45] For the purpose of this application, the plaintiff initially claimed *ta'widh* at 1%pa on overdue installments and shall continue to be levied cumulatively on installments falling into arrears until 30 November 2011 and upon maturity of the BBA facility, late payment charges at the prevailing Islamic interbank money market rate on the outstanding purchase price until full settlement. This item was challenged by the defendants on the ground that the compensation calculated by the plaintiff is on compounded basis which is against the agreements.

[46] However, the same has been corrected where it has been averred by the plaintiff that the correct one is at 1%pa on the outstanding amount until 30 November 2011 (maturity date of facility) and at the then prevailing Islamic interbank money market until full settlement. This error, according to the plaintiff, would not give effect to the amount claimed by the plaintiff because there is no *ta'widh* imposed as evidenced in the statement of account.

[47] *Al-Ta'wid* (compensation) is to cover the loss that has happened due to transgression or negligence or offence. Literally it means substitute, counter value. Technically it is to pay what is required of a financial counter-value because of inflicting losses on others. The Fiqh Academy Journal defines *al-ta'wid* as payment of financial compensation or counter-value, which is obligatory as a result of loss caused to others (see Dr 'Ali Muhyi al-Din al-Qurah Daghi, *The Problem of Delayed Debts and Their Guarantees in Islamic Banks: A Shariah Study on Compensation for Deferred Loans*, Contemporary Issues in Islamic Finance: Deliberation at the International Shariah Scholars Dialogue 2006, Central Bank of Malaysia, at p 130). The SAC defines ta'widh as giving compensation on losses incurred resulting from harmful incidences (see *Shariah Resolutions in Islamic Finance*, Bank Negara Malaysia, 2007, at p 88).

[48] The imposition of *ta'widh* is essential. In its 95th meeting on 28 January 2010, SAC had this to say:

As a deterrent mechanism against cases of default by customers in discharging their financial obligation arising from Islamic contracts, the imposition of late payment charge by Islamic banking institutions that comprises both concepts of *gharamah* (fine or penalty) and *ta'widh* (compensation) is allowable.

[49] It is undisputed that the plaintiff has the right to impose the *ta'widh* on the defendants on the above said circumstances. However, the challenge raised on this issue revolves around the amount that the plaintiff is entitled for.

[50] In its fourth meeting, held on 14th February 1998/16 Syawal 1418, the SAC has resolved that *ta'widh* may be imposed on the defaulting customer who fails to meet his obligation to pay the financing based on the following conditions:

(i) the amount of ta'widh cannot exceed the actual loss suffered by the financier;

(ii) the determination of compensation is made by a third party, which is Bank Negara Malaysia; and

(iii) the default or delay of payment is due to negligence on the part of the customer.

[51] Pursuant to the above said resolution, it was agreed by parties that the first defendant has to pay the plaintiff compensation on overdue installments and payments of the selling price as follows:

(a) for failure to pay any installments of the facility from the date of first disbursement until the date of maturity of the facility, the compensation rate that shall be applied is 1%pa on the overdue amount or any other method approved by Bank Negara Malaysia;

(b) for failure to pay any installments and which failure continues beyond the maturity date of the facility, the compensation rate shall be applied is the Bank's current Islamic interbank money market rate on the principal balance or any other method approved by Bank Negara Malaysia; and

(c) the amount of such compensation shall not be compounded on the overdue amount and/or principal balance as the case may be,

(see para 22(i)–(iii) of the letter of offer).

[52] In the light of the above, this court has no hesitation to uphold what have been agreed by the parties in respect on *ta'widh* that the rate of *ta'widh* must be in accordance with para 22 (i)–(iii) of the letter of offer and nothing diverse to it.

CAUSE OF ACTION AGAINST THE SECOND DEFENDANT

[53] I shall now deal with the last issue which concerns on the liability of the second defendant under the BBA facility.

[54] According to learned counsel for the defendants, the second defendant is not a guarantor and/or principal debtor to pay the outstanding balance under the BBA facility. He merely guaranteed up to the shares charged in the MOD.

[55] Regarding this, this court refers to cl 6.1 of the MOD. The provision reads:

> Upon the happening of any Event of Default, you may without any notice to us or the Customer realize, sell or dispose of the Securities or any part thereof in such other manner for such consideration (whether payable or deliverable immediately or by installments) as you may think fit without being in any way responsible for any loss occasioned thereby however arising … *In the event of any deficiency after the sale of the Securities subject hereto whatsoever and howsoever arising we agree to make good and pay on demand to you such deficiency* … (Emphasis added.)

[56] By virtue of the above said provision, it is clear that the plaintiff has a right to claim the outstanding amount from the second defendant as the chargor. In this case, the second defendant is the director of the first defendant's company. He is learned enough to peruse and read the MOD before signing it. Once executed is deemed binding upon him unless he could prove that there is a vitiating factor such as duress and misrepresentation involved which is not the case in the present application.

CONCLUSION

[57] In this case, the parties have voluntarily agreed to be bound by the terms and conditions of specific agreements as mentioned before. They have also agreed to be bound by some mechanism and process to give effect to the ultimate intention of the parties ie to refinance the first BBA facility.

[58] His Lordship Visu Sinnadurai J in *Polygram Records Sdn Bhd v The Search* [1994] 3 MLJ 127; [1994] 1 LNS 205 observed at p 147 (MLJ) as follows:

> The general principle of law, of course, is that a party who signs a written contract is bound by the terms of the contract, except in the limited cases where fraud, undue influence, or misrepresentation may be established. This rule is so strict that even if a party to a contract has not read the contents of a contract, he is held to be bound by its terms. In the leading case of *L'Estrange v F Graucob* [1934] 2 KB 394, Scrutton LJ pronounced (at p 404):
>
> When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

[59] The same position also applies to Islamic transactions. Shariah orders that obligations and contracts be fulfilled:

(a) 'O ye who believe! Fulfill all obligations' (surah *al-Maidah*, 5:1);

(b) 'And fulfill (every) obligation, for (every) obligation will be inquired into (on the day of reckoning)' (*Al-Isra'*, 17:34); and

(c) 'Muslim are bound by their conditions' (Al-Bukhari, Sahih, Vol XIII 'Kitab al-shurut', al-Mat ba'ah al Masriyah, 1934, at p 289).

[60] In this instant case, the court is satisfied that there is no real prospect for the defendants successfully defending the claim by the plaintiff. *Halsbury's Laws of Malaysia*, Vol 1: Civil Procedure, at p 62 states:

> The underlying philosophy of the Order 14 procedure is to prevent the Plaintiff clearly entitled to his money from being delayed in obtaining his judgment where there is no fairly arguable defence to the claim and the procedure enables the Plaintiff to obtain a final judgment without a trial.

[61] In *John Wallingford v The Directors & C of The Mutual Society* [1880] 5 AC 685, HL at pp 699–700, Lord Haltherley referred to the object of summary judgment procedure as follows:

> I apprehend that from the first objects of these short methods of procedure has been to prevent unreasonable delay, a delay which was very prejudicial to the creditors, and never, I am afraid, or rather, I am pleased to say, can have been very beneficial to the debtor himself. Simply allowing legal proceedings to take place, in order that delay may be applied to the administration of justice as much as possible, is not an end or which we can conceive the legislature to have framed the provisions which now exist under the several Judicature Acts. If a man really has no defence, it is better for him as well as his creditors, and for all the parties concerned, that the matter should be brought to an issue as speedily as possible; and therefore there was a power given in cases in which plaintiffs might think they were entitled to use the power by which, if it was a matter of account, an account might be immediately obtained upon the filing of a bill, or, if it was a matter in which the debt was clear and distinct, and in which nothing was needed to be said or done to satisfy a judge that there was no real defence to the action, recourse might be had to an immediate judgment and to an immediate execution.

[62] In the above circumstances, I therefore allowed the plaintiff's application with costs.

Plaintiff's application allowed with costs.

Reported by Kohila Nesan